No. 89-1966 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD A. BANKS, PETITIONER

v.

H. LAWRENCE GARRETT, III,
SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Navy violated the First Amendment, the Privacy Act, or other federal law by transferring petitioner, a reserve Naval officer, to a non-pay status based upon petitioner's unauthorized communication to members of Congress made in petitioner's official capacity and concerning Navy affairs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 901 F.2d 1485. The opinion of the district court (Pet. App. A9-A24) is reported at 705 F. Supp. 282.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990, and a petition for rehearing was denied on March 12, 1990. The petition for a writ of certiorari was filed on June 11, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Captain in the United States Naval Reserve, was the commanding officer of Naval Reserve Squadron VFA-303 when he wrote a letter to various members of Congress expressing his concern over the Navy's failure to supply certain aircraft to his squadron and requesting congressional action. He wrote the letter on official Navy letterhead, over his signature as commanding officer, and expressly stated that he was writing as the commanding officer of VFA-303. The Secretary of the Navy neither authorized nor consented to the transmission of this letter. Pet. App. A10-A13, B11 n.3.

Petitioner's superior, Rear Admiral T. F. Rinard, Commander of the Naval Reserve Forces, had previously advised petitioner that a service member could correspond with members of Congress either as a private citizen or through the Navy chain of command, but Rinard counseled petitioner against writing directly to Congress in his official capacity. Pet. App. A12. Upon learning that petitioner had ignored this advice, Rinard determined that petitioner had violated Article 1149 of United States Navy Regulations (1973), which provides, in pertinent part:

> No person in the naval service shall, in his official capacity, apply to the Congress or to either house thereof, or to any committee thereof, for legislation or for appropriations or for Congressional action of any kind except with the consent and knowledge of the Secretary of the Navy.

Rinard reassigned petitioner from his position as Squadron Commander of VRA-303 to a voluntary, non-paying position with a Naval Reserve training unit. Thereafter, petitioner brought suit in district court, alleging that his reassignment violated the First Amendment and the

Privacy Act, 4 U.S.C. 552a(e)(7). He also asserted a claim for back pay. Pet. App. A9-A10, A12-A15.

The district court first dismissed petitioner's Privacy Act claim (Pet. App. A1) and his claim for back pay (*id.* at A6). The court then conducted a trial and dismissed petitioner's First Amendment claim. *Id.* at A7-A8, A9-A24, B4-B5. The district court determined that petitioner had violated Article 1149 because he wrote the letters without authorization on official Navy letterhead in his official capacity as commanding officer of the squadron. Pet. App. A22. Applying this Court's decision in *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), the court held that Article 1149 is "a proper regulation as to time, place and manner and reasonably related to valid public interests" (Pet. App. A23) and that the "military's interest in uniformity, esprit de corps and efficiency of the Navy outweighs [petitioner's] exercise of his First Amendment rights in this case." *Ibid.* The court therefore dismissed petitioner's action with prejudice. *Id.* at A7-A8.

2. The court of appeals affirmed the district court's decision. Pet. App. B1-B12. With respect to the back pay claim, the court of appeals first found that none of the statutory provisions that petitioner cited in support of that claim created any entitlement to pay following his transfer and that petitioner, accordingly, had failed to state a claim on which relief could be granted. *Id.* at B6-B7. The court then rejected petitioner's First Amendment and Privacy Act claims, holding that under this Court's decision in *Goldman*, the Navy could permissibly restrict communications between service members, acting in their official capacity, and Congress. *Id.* at B8-B12.

ARGUMENT

This Court stated in *Goldman* v. *Weinberger*, *supra*, that "review of military regulations challenged on First

Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." 475 U.S. at 507. The Court explained:

> The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

Ibid. (citations omitted). The Navy's regulation, which restricts communication between Congress and service members purporting to act in their official capacity, is plainly designed to foster military "obedience, unity, commitment, and esprit de corps" and to assure that communications between the Executive and Legislative Branches are conducted through appropriate channels. Furthermore, the regulation, which places no restriction on a service member's communications with Congress as a *private citizen*, "restrict[s] speech no more than is reasonably necessary to protect the substantial governmental interest." *Brown* v. *Glines*, 444 U.S. 348, 355 (1980). The lower courts correctly held that the Navy's limitation on a service member's communications with Congress does not violate the service member's First Amendment rights.

1. Petitioner appears to concede that the Navy may restrict communications between regular active duty naval personnel and Congress. He argues, instead, that his communication with Congress is entitled to First Amendment protection because he is a naval reservist rather than a member of the "regular naval personnel." Pet. 7-11. Petitioner advances no authority—and we know of none—for

this novel proposition. This Court's decision in *Goldman* extends special deference to "military regulations" as compared to "regulations designed for civilian society." 475 U.S. at 507. Neither *Goldman* nor the relevant Navy regulation, which, by its terms, applies to "any person in the naval service" (Pet. App. B4), draws a distinction between reservists and other personnel. Indeed, the line petitioner draws makes no sense. When a military officer purports to act in his official capacity, he directly implicates the military's interests whether he is a reservist or a regular member. Petitioner concedes that there is "no precedent" (Pet. 7) for his position and, hence, no conflict with another court of appeals.

2. Petitioner also contends that he is entitled to special protection as a "whistleblower." Pet. 11-18. Petitioner fails to recognize, however, that the Navy regulation at issue, Article 1149, does not restrict his communications with Congress based on their content, but rather on his representation that he is acting "in his official capacity." Navy regulations, specifically Article 1148, permit communication between members of Congress and service members acting in their private capacity "unless the communication is unlawful or violates a regulation necessary to the security of the United States." See Pet. App. B11.

Petitioner further contends that the Navy's decision to transfer him to a non-pay status violates a recently enacted federal statute that prohibits the military from taking "retaliatory personnel actions" against persons who report evidence of "a violation of a law or regulations" or of "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 10 U.S.C. 1034(b) and (c)(2). Even assuming what we do not concede—that this 1988 law reaches a military officer's unauthorized communications in his official capacity—the law is not applicable to petitioner's transfer,

which occurred in 1984. Congress has expressly stated that the statute shall apply only to "personnel action taken (or threatened to be taken) on or after the date of the enactment of this Act." National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, Tit. VIII, § 846(d), 102 Stat. 2030. See Pet. App. B8 n.1.

3. Petitioner argues that the court of appeals mistakenly described him as a "public employee." Pet. 18-20. That description, however, is beside the point. The relevant question, for purposes of Article 1149, is whether petitioner made an unauthorized communication with Congress in his "official capacity." As the court of appeals explained, it is "patently clear" (Pet. App. B10) that petitioner communicated to Congress in his official capacity. Petitioner wrote to members of Congress on official Navy letterhead, he stated that he was corresponding as "Commanding Officer" of his squadron, and he signed the letter using the title "Commanding Officer." See *id.* at B3-B4, A12-A20. Although petitioner suggests these are "superficial facts" (Pet. 20), they are plainly adequate to support the district court's findings.

4. Petitioner contends that "other important issues such as inconsistent treatment of whistleblowers, due process, Privacy Act rights, and [petitioner's] right to back pay arise from the primary First Amendment question raised in this case." Pet. 23. Petitioner's farrago of fact-bound subsidiary issues plainly does not merit further review. Petitioner does not contend that any of these issues presents a conflict among the courts of appeals, and with the exception of the Privacy Act and back pay claims, he does not advert to any legal principles supporting the request for review. See *id.* at 23-29. As to the Privacy Act claim, petitioner conceded that "[t]his subsidiary issue flows from the primary First Amendment issue" (*id.* at 27). But since petitioner's "primary First Amendment

question" does not present a substantial issue, there is no basis for further review of "the wholly derivative Privacy Act claim." Pet. App. B12. As to the back pay claim, the court of appeals correctly ruled that petitioner, who was lawfully transferred to a non-pay status, failed to demonstrate a substantive right to payment of money from the United States. *Id.* at B5-B7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney

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